



Control Number: 49737



Item Number: 98

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SOAH DOCKET NO. 473-19-6862
PUC DOCKET NO. 49737

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APPLICATION OF SOUTHWESTERN ELECTRIC POWER COMPANY FOR CERTIFICATE OF CONVENIENCE AND NECESSITY AUTHORIZATION AND RELATED RELIEF FOR THE ACQUISITION OF WIND GENERATION FACILITIES	§ § § § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
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**SOUTHWESTERN ELECTRIC POWER COMPANY'S RESPONSE TO TEXAS
INDUSTRIAL ENERGY CONSUMERS' MOTION TO COMPEL**

The Administrative Law Judges should deny Texas Industrial Energy Consumers' (TIEC) motion to compel production of Item Nos. 15, 16, and 19 through 37 listed on Southwestern Electric Power Company's (SWEPCO) privilege index. As discussed herein, these documents are entitled to protection under the work-product privilege and were thus properly withheld from production.

I. Introduction

SWEPCO received TIEC's motion to compel on September 10, 2019. As provided for in 16 TAC § 22.144(g), SWEPCO filed a request for in camera inspection identifying the factual and legal bases for its assertions of privilege and the withheld documents were provided under seal to the presiding officer.

TIEC's motion to compel concerns Item Nos. 15, 16, and 19 through 37¹ on SWEPCO's revised privilege log, which are all of the documents identified in SWEPCO's privilege log as being withheld only on the basis of the work-product privilege that SWEPCO determined were

¹ As stated previously, only limited portions of the documents identified in the revised privilege index at issue here are responsive to TIEC's request for information. Request for Inspection at 2.

prepared in reasonable anticipation of future regulatory litigation. Consistent with 16 TAC § 22.144(f), SWEPCO now files its complete response to TIEC's motion to compel.

II. Work-Product Privilege

TIEC argues that Item Nos. 15, 16, and 19 through 37 are not entitled to protection under the work-product privilege because, in its view, SWEPCO failed to sufficiently demonstrate the documents were prepared in anticipation of litigation. This is mistaken.

As explained in SWEPCO's request for in camera inspection, accompanied and supported by the affidavit of John Crespo, the documents at issue consist of emails and supporting materials prepared at the request of counsel pertaining to SWEPCO's regulatory planning process in preparation for seeking regulatory approvals and in anticipation of contested regulatory litigation.² Additionally, Item Nos. 15, 16, and 19 through 37 reflect an ongoing internal dialogue and include materials and impressions created in support of the Company's internal development of its positions for and in anticipation of regulatory litigation.³ As supported by the affidavit of John Crespo and substantiated by the documents themselves as described on the revised privilege index, these documents meet the standard for work product set forth by the Texas Rules of Civil Procedure and the Texas Supreme Court.⁴

The Texas Rules of Civil Procedure define attorney work product as "material prepared or mental impressions developed in anticipation of litigation" by or for a party and its representatives or "communication made in anticipation of litigation" between a party and its representatives.⁵ The

² Request for In Camera Inspection at 3.

³ *Id.* at 3-4.

⁴ Affidavit of John Crespo at ¶¶ 3-6; Revised Privilege Index (Aug. 30, 2019); *see also In re Fairway Methanol LLC*, 515 S.W.3d 480, 494 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding) (citing *Weisel Enters., Inc. v. Curry*, 718 S.W.2d 56, 58 (Tex. 1986)) (explaining "the documents themselves" may corroborate claim of privilege).

⁵ Tex. R. Civ. P. 192.5(a)(1)-(2).

Supreme Court of Texas has clarified that what constitutes “anticipation of litigation” is determined by a two-part test. The first part of the test analyzes, from an objective standpoint, whether a “reasonable person would have concluded from the totality of circumstances surrounding the investigation that there was a substantial chance that litigation would ensue.”⁶ The second part of the test applies a subjective standard to determine whether “[t]he party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation.”⁷

As an initial matter, and contrary to TIEC’s assertion, “the language of Rule 192.5 does not require the sole or primary purpose of the material or communication be for preparing for litigation.”⁸ Even so, SWEPCO has made a sufficient showing that the creation and preparation of the communications and documents at issue indeed were primarily aimed toward preparing for regulatory litigation.⁹ SWEPCO does not seek to “improperly expand” the privilege, but asks for the work-product privilege to be applied in accordance with the standard set forth under Texas law. TIEC presents a slippery-slope argument against applying the work-product privilege in this instance. This contention lacks merit. Specifically, SWEPCO does not assert that “every action a utility takes is subject to regulation and may be reviewed in a future case before the Commission.”¹⁰ Neither has SWEPCO sought to use the work-product privilege as an umbrella to withhold documents created for “some other purpose.”¹¹

⁶ *Nat’l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993).

⁷ *Id.*

⁸ *In re Fairway Methanol LLC*, 515 S.W.3d 480, 490 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding). Neither does the prevailing standard require litigation be imminent. *See id.* at 491-92 (noting Supreme Court of Texas rejection of “the “imminence” requirement as inconsistent with the policy goals of the privilege).

⁹ Affidavit of John Crespo at ¶ 6, attached to SWEPCO’s Request for In Camera Inspection.

¹⁰ TIEC Motion to Compel at 3.

¹¹ TIEC Motion to Compel at 2.

There is a specific statutory requirement in Texas that SWEPCO file for regulatory review of any acquisition of generation resources.¹² In this case, it was a virtual certainty that regulatory litigation would ensue. These documents reflect a reasonable recognition that any project selected in the Company's request for proposal (RFP) would necessarily be subject to a CCN proceeding. Thus, TIEC's argument that these documents could not have been prepared in anticipation of litigation because they are dated prior to the issuance of SWEPCO's RFP ignores the practical realities of the regulatory planning process and the totality of the circumstances before SWEPCO. SWEPCO's complex planning and coordination process with respect to its preparation for CCN litigation commenced prior to the issuance of the RFP, which is not at all surprising considering the significant dollar amounts involved and various potential issues that could arise. Moreover, the RFP process itself is at issue in this proceeding.¹³

As to the objective prong of the test, considering the totality of the circumstances, there must be a substantial chance of litigation. This threshold is met. For the reasons outlined above and in its request for in camera inspection, SWEPCO's anticipation of litigation was reasonable under the circumstances—that is, a reasonable person would conclude from the totality of circumstances surrounding the investigation (and in particular the statutory CCN filing requirement) that there was a substantial chance that litigation would ensue.¹⁴

¹² PURA § 37.058; *see also* §§ 37.053, 37.056.

¹³ *See* Direct Testimony of Jay F. Godfrey (providing testimony on RFP process); Direct Testimony of John Torpey (providing testimony regarding RFP process with respect to economic benefits evaluation).

¹⁴ *In re Fairway Methanol LLC*, 515 S.W.3d at 491-92 (concluding objective prong met “whenever the circumstances surrounding the investigation would have indicated to a reasonable person that there was a substantial chance of litigation”); *In re Park Cities Bank*, 409 S.W.3d 859, 867 (Tex. App.—Tyler 2013, no pet.) (noting the test for work-product requires looking at totality of circumstances to “determine whether a reasonable person in the party’s position would have anticipated litigation and whether the party actually did anticipate litigation”).

As to the subjective prong, SWEPCO reasonably possessed a good faith belief litigation had a substantial chance of occurring. As confirmed by the revised privilege index and John Crespo's affidavit, the communications and documents at issue were "prepared at the request and under the direction of counsel" and "in anticipation of litigation."¹⁵ The documents themselves substantiate this assertion.¹⁶ Finally, Mr. Crespo's affidavit describes the ongoing dialogue within the Company by the individuals charged with analyzing issues of the regulatory planning process in anticipation of litigation.¹⁷ The Texas Supreme Court has held that the "prospect of litigation was enough to trigger the privilege and that 'substantial chance' means only that litigation is "more than merely an abstract possibility or unwarranted fear."¹⁸ Considering the statutory requirements and regulatory concerns the Company had to account for, SWEPCO's good-faith belief that a substantial chance of litigation existed is reasonable.

Accordingly, SWEPCO has only withheld from production those documents that are exempted from permissible discovery as privileged.¹⁹

¹⁵ Affidavit of John Crespo at ¶¶ 4-5.

¹⁶ SWEPCO has supported its work product assertion with the affidavit of Mr. Crespo that accompanied its request for in camera inspection. TIEC asserts that the non-litigation titles of items listed on SWEPCO's privilege index somehow rebuts that these documents are work product. This argument has been well-refuted above. Moreover, the substance of the documents and communications are the basis of SWEPCO's assertion of privilege. For example, one of the documents cited by TIEC is titled "Regulatory Talking Points." In addition, the documents submitted under seal for in camera inspection clearly reflect the anticipation of litigation. *See, e.g.*, Bates pages 38, 44, 57-63, 68-69, 71-72, 79, 85-88-89, 92, 96-98.

¹⁷ Affidavit of John Crespo at ¶ 6.

¹⁸ *Brotherton*, 851 S.W.2d at 204-05.

¹⁹ *See* Tex. R. Civ. P. 192.3(a) ("[A] party may obtain discovery regarding any matter *that is not privileged* and is relevant to the subject matter of the pending action . . .") (emphasis added); 16 TAC § 22.141(a) ("Parties may obtain discovery regarding any matter, *not privileged* or exempted under the Rules of Civil Evidence, the Texas Rules of Civil Procedure, or other law or rule . . .").

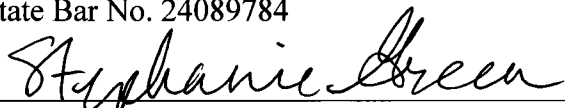
III. Conclusion

Based on the foregoing, SWEPCO respectfully requests that its work product privilege-based objections be sustained, TIEC's motion to compel be denied, and that it be granted any other relief to which it may be entitled.

Respectfully submitted,

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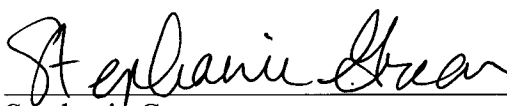
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**ATTORNEYS FOR SOUTHWESTERN
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this motion was served on all parties of record this 17th day of September, 2019.


Stephanie Green